THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.11314 OF 2005

DISPOSED OF ON 06-10-2005.

BETWEEN:

S.NARSIMHA RAO …….. PETITIONER

AND

THE SINGARENI COLLIERIES COMPANY LTD

HYDERABAD. AND OTHER …….. RESPONDENTS

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.11314 OF 2005

O R D E R :

1. The petitioner challenges tender notice published in Deccan Chronicle dated 5.5.2005 so far as it relates to item No.2 therein i.e.MMR/PD/E-32/2005, DATED 5.5.2005 for transportation of coal from KK2 incline to SK/RKP CSP.

2. The petitioner deals in transport business. The petitioner was awarded contract for transportation of coal from KK2 (Kalyanikhani, loading point) incline to RKP (Ramakrishnapur, unloading point)/CSP (coal screening point) for a period of two years. The distance between KK2 incline to RKP/CSP is 10.165 KM. He executed an agreement bond dated 16.8.2004 and the respondent-authorities issued Firm Order dated 17.7.2004. As per clauses 7 and 27 of the Firm Order and clauses 9 and 28 of the Agreement Bond, in case there is any variation in lead distances between linkages, payment will be made proportionate at the rate agreed for that linkage. 2nd respondent addressed a letter to the petitioner vide reference MMR/PD/AMM.111/04-05/179, dated 15.3.2005 requesting him to attend for negotiations on 17.3.2005 at about 3.30 P.M. due to change of coal linkage i.e. from KK2 incline to SK/CSP w.e.f. 1.4.2005. The petitioner approached 2nd respondent and submitted a letter dated 30.3.2005 expressing his consent for transportation of coal from KK2 Incline to SK/CSP. 2nd respondent confirmed the acceptance of the petitioner for transportation of coal from KK2 incline to SK(Santhikhani)/CSP(Coal screening point) for a period of three months from the date of awarding the contract subject to the same terms and conditions as per the previous order dated 17.7.2004. As per the original contract awarded in favour of the petitioner, he was to transport coal from KK2 incline to RKP/CSP. The period of contract was for two years i.e. from 17.7.2004 to 16.7.2006. As per the terms and conditions of the Firm Order as well as the agreement bond, the respondents have to provide a quantity of 600 MTs. The petitioner has been transporting coal as per the agreement bond and the firm order. Therefore, issuance of tenders for transportation of coal from KK2 incline to SK/RKP/CSP is not legal and proper, according to the petitioner. Thus, this writ petition.

3. The petitioner filed WPMP.No.14498 of 2005 seeking for interim relief. An interim order came to be passed on 17.5.2005 and it reads as follows:

" The respondents are directed not to interfere with the right of the petitioner for transportation of coal from KK point.2 incline to SK-CSP, as the said contract work was awarded by the Firm Order dated 17.7.2004, if the said order is not cancelled."

4. The respondents entered appearance and filed WVMP.No.1858 of 2005 with a prayer to vacate the interim order dated 17.5.2005. When the vacate stay petition came up for hearing, both the counsel consented for disposal of the main writ petition itself. Accordingly, the writ petition is heard finally and it is being disposed of by this order.

5. The sum and substance of the counter affidavit filed by the respondents is :

The award of contract to the petitioner firm for the distance covered from KK-2 incline to RKP-CSP is not in dispute. The rate of contract was Rs.2.36 paise per KM. Subsequently the linkage has been changed i.e. from KK2 incline to CSP-SK and the new distance is 11.450 Kms. When the distance is increased, the rate automatically comes down. However, the petitioner did not agree to reduce the rate. As the linkage has been changed, it becomes a new contract and the petitioner does not have any vested right to claim allotment of new contract. The petitioner was called for negotiations on 17.5.2005 in the office of 2nd respondent with regard to change in linkage. The petitioner had failed to attend the negotiations and expressed his inability to reduce the rate from Rs.2.36 paise per tonne per KM. As there is change in linkage, a new contract has been created and it necessitated the respondents for issuance of fresh tender notification. The petitioner can also submit his bid along with other tenders.

6. The petitioner filed reply affidavit and thereupon the respondents filed additional counter affidavit. The stand of the parties in their additional pleadings is the same as that of in their original pleadings. It is suffice to refer para 7 of the reply affidavit filed by the petitioner and it is thus:

" 7. In reply to the averments mentioned in para No.9 of the counter affidavit I submit that a reading of the Clauses 7 and 27 of the Firm order and clauses 7 and 26 of the Agreement bond would make it clear that the

petitioner firm is entitled for awarding contract even if there is any change in the distance by paying proportionate rate as agreed upon by the respondent company in the original contract."

7. Heard learned counsel for both the parties.

8. Learned counsel appearing for the petitioner contends that the works for which the tender notice has been issued and published in Deccan Chronicle dated 11.5.2005 includes the works already allotted to the petitioner under agreement bond dated 16-8-2004 and the Firm Order dated 17.7.2004 and, therefore, the tender notice impugned in the writ petition is liable to be set aside. He also submits that the respondents being instrumentalities of the State are required to be fair and reasonable even in the matter of awarding contract. A further submission has been made that the respondents-authorities cannot invite tenders in respect of the work which was entrusted to the petitioner in pursuance of the Firm Order dated 17.7.2004 and the Agreement Bond dated 16-8-2004.

9. Learned Standing Counsel appearing for the respondents submits that whenever there is change of linkage, a fresh tender notice is required to be issued. He further submits that as the linkage has been changed, there is increase in distance and as such the rate also comes down and as a result a new contract for transportation of coal forms. He further submits that the dispute in the instant writ petition arises out of the concluded commercial contract between the petitioner and respondents and therefore the writ petition does not lie. In support of his submissions, he placed reliance on a decision of this court in VIJAY FIRE PROTECTION SYSTEMS LTD. V. VISAKHAPATNAM PORT TRUST and a decision of Supreme Court in STATE OF BIHAR V. JAIN PLASTICS AND CHEMICALS LIMITED. In the first cited decision, this court held that Visakhapatnam Port Trust may be an authority for the purpose of Articles 12 and 226 of the Constitution of India; but, it is not as if, its every action is amenable to be corrected in a judicial review proceedings by this Court. In the second cited decision, the Supreme Court held that it is settled law when an alternative and efficacious remedy is open to the litigant it should be required to

pursue the remedy first, and not to invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not effect the jurisdiction of the court to issue writ. But, ordinarily that would be a good ground in refusing to exercise the discretion under Article 226.

10. The dispute in the instant writ petition arises out of the concluded commercial contract between the petitioner and the respondent. The terms and conditions of the contract and the work order are not traceable to any statute or statutory instrument and the dispute arises in the realm of pure private law.

11. The law on the subject is succinctly summarized by the Apex Court in STATE OF U.P. v. BRIDGE & ROOF CO. (INDIA) LTD. and it reads as under:

> " **(15)** IN our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D (1).
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> **(16)** FIRSTLY, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not , are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioners' bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.
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> **(17)** SECONDLY, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of Clause 70 of the Contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the Civil Court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the Civil Court, as the case may be, according to law. Similarly if the government says that any over-payment has been made to the

respondent, its remedy also is the same.

(18) ACCORDINGLY, it must be held that the writ petition filed by the respondent for the issuance of a writ of Mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. The writ petition ought to have been dismissed on this ground along."

It is the contention of the learned counsel for the petitioner that the notification impugned in the writ petition covers the route which was the subject matter of the earlier contract which is in force and, therefore, the impugned notification is required to be set aside so far as it covers the route from KK2 Incline to RKP/CSP.

12. The core issue in this case is whether the route for which tenders are invited is only because of variation in lead distance between the linkages or totally a new contract. Learned counsel appearing for the petitioners by making copious references to the Firm order and the Agreement Bond submits that the route notified in the impugned notification is only because of variation in lead distances between the linkages and therefore the contract is to be awarded to the existing contractor as per clauses 7 and 27 of the Firm Order and clauses 9 and 28 of the Agreement Bond. The said clauses read as under:

" Clause 7 of Firm Order:

During the operation of the contract in case there is variation in lead distances between linkages the payment will be made proportionate to the rate agreed for that linkage.

Clause 27 of Firm Order:

However, for any reason during the period of contract if coal to be transported to any linkage other than the main linkage, it shall be at the applicable rate for the slab distance within which actual distance from the Mine to such secondary linkage falls.

Clause 9 of Agreement Bond:

During the operation of the contract, in case there is variation in lead distances between linkages the payment will be made proportionately to the rate agreed for that linkage.

Clause 28 of the Agreement Bond:

However, for any reason during the period of contract if coal to be transported to any linkage other than the main linkage, it shall be at the proportionate rate for the distance within which actual distance from the Mine to such secondary linkage fails."

A plain reading of the above clauses indicates that in case of variation in lead distance between linkages, the payment will be made proportionate at the rate agreed to that linkage. The route which is the subject matter of earlier contract is KK2 Incline to RKP-CPS. The distance between KK2 Incline to RKP-CPS is 10.165 KM. The route notified in the notification impugned in the writ petition is KK2 Incline to SKP/RKP/CPS. In other words, the route is between KK2 incline to coal screening plant at Santi Kani. The distance between loading points and unloading point is 11.450 KM. The respondents placed on record a map to show the route for which the contract between the petitioner and respondent is in force and the route which is notified. A maiden look at the map placed on record clearly indicates that the route notified in the impugned tender notification is altogether a new route and it is not because of change in lead distances between linkages i.e. loading and unloading point. Therefore, the contention of the learned counsel for the petitioner that the route notified in the notification impugned in the writ petition is only because of change in linkage between KK2 incline to RKP/CSP has no merit. In that view of the matter, the petitioner cannot have any objection for notifying the route for transportation of coal from KK2 incline to SKP/RKP/CSP.

13. A contention has been advanced by learned counsel appearing for the petitioner that the respondents have awarded the contract for transportation of coal from KK2 incline to SK/CSP for a period of three months commencing from 1.4.2005 to 30.6.2005 at the rate agreed by the petitioner i.e at Rs.2.36 paise per tonne per KM and therefore the contract should have been continued with co-terminus with the original contract in respect of transportation of coal from KK2 Incline to RKP-CSP. Admittedly, the period for which the petitioner has been permitted to transport coal to the new linkage i.e. KK2 incline to SK/CSP has been expired. The petitioner has no

legal right, which he can seek for enforcement by invoking jurisdiction of this Court under Article 226 of the Constitution of India.

14. Before parting with the case it is to be clarified that the original contract between the petitioner and the respondents for transportation of coal is from KK2 Incline to RKP/CSP. The respondents-authorities shall ensure the said route during the subsistence of original contract and the same shall not be disturbed because of formation of new linkage from KK2 Incline to SK/RKP/CSP.

15. In the result, I find that the writ petition is devoid of merits and the same is hereby dismissed, but in the circumstances of the case without costs.

Dated: 06-10-2005. (B.SESHASAYANA REDDY,J)

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